No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY AND JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Do the Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945, and 20 C.F.R. § 727.203 (1986) require invocation of the benefit eligibility presumption contained in 20 C.F.R. § 727.203 upon the presentation of any evidence, without regard to its weight, accuracy, reliability, or probative value?

2. May the court of appeals refuse to accord deference to the consistent, fifteen-year-long interpretation of the presumption by the Secretaries of Health and Human Services and Labor, that the presumption may be invoked only upon proof of an invoking fact by a preponderance of the evidence?

3. Are the rules of proof contained in Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), superseded in black lung adjudications by any provision of law, in keeping with the rule against supersedure of 5 U.S.C. § 559?

4. Under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), may a black lung claimant establish invocation of the presumption contained in 20 C.F.R. § 727.203 without proving invocation facts by a preponderance of the evidence?

LIST OF PARTIES

This case involves three separate claims for black lung benefits consolidated in the Court of Appeals. Glenn Cornett, a claimant, and the Mullins Coal Company, Incorporated of Virginia ("Mullins"), Cornett's former employer, were respondent and petitioner, respectively, in the Court of Appeals. The Old Republic Insurance Company ("Old Republic") is the black lung insurance carrier for Mullins and was a petitioner in the Court of Appeals. Luke Ray, claimant, and his last employer, the Jewell Ridge Coal Corporation ("Jewell"), were petitioner and respondent, respectively, in the Court of Appeals. Gerald Stapleton, claimant, and his last employer, the Westmoreland Coal Company, were petitioner and respondent, respectively, in the Court of Appeals.

The Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the Black Lung Program and intervened in all three cases before the Court of Appeals. The Director, as authorized by the Secretary of Labor, is a statutory party in all black lung claim proceedings, 30 U.S.C. § 932(k).

Mullins, Old Republic and Jewell are the petitioners herein and all other parties are respondents.

A list in compliance with Rule 28.1 is set forth in the Petition for Certiorari at ii, and remains unchanged.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals in *Stapleton* v. *Westmoreland Coal Co.* is reported at 785 F.2d 424 and is reprinted in the Appendix to the Petition for Writ of Certiorari (Pet. App. 1a).[1] The order of the Court of Appeals denying rehearing is unpublished and is reprinted in the Appendix (Pet. App. 152a). In Cornett's claim, the order of the Benefits Review Board denying reconsideration (Pet. App. 135a), the decision and order of the Benefits Review Board (Pet. App. 138a), and the decision and order of the administrative law judge (Pet. App. 141a) are all unreported and are reprinted in the Petitioners' Appendix as noted. In Ray's claim, the decision and order of the Benefits Review Board (Pet. App. 118a) and the decision and order of the administrative law judge (Pet. App. 125a) are unreported and

1. Petitioners' *Motion to Dispense With the Printing of the Joint Appendix* was granted on February 23, 1987. Citations to the Petitioners' Appendix ("Pet. App.") in this Brief refer to the Appendix to the Petition for Writ of Certiorari.

are reprinted in the Petitioners' Appendix as noted. In Stapleton's claim, the decision and order of the Benefits Review Board (Pet. App. 102a) and the decision and order of the administrative law judge (Pet. App. 106a) are unreported and are reprinted in the Petitioners' Appendix as noted.

JURISDICTION

The decision of the Court of Appeals was entered on February 26, 1986. A timely petition for rehearing was denied on April 21, 1986. On July 8, 1986, the time for filing the petition for a writ of certiorari was extended to August 29, 1986 (Pet. App. 155a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

Jurisdiction was conferred on the Court of Appeals in each of the three cases by the filing of a timely petition for review of a decision and order of the Benefits Review Board, United States Department of Labor, in accordance with 33 U.S.C. § 921(c) as incorporated by reference into 30 U.S.C. § 932(a).

STATUTES AND REGULATIONS INVOLVED

1. 20 C.F.R. § 727.203 (1986) (the "Interim Presumption") (also at Pet. App. 156a-158a).

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title [20 C.F.R. § 410.428 (1986)]);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements

for duration in § 410.412(a) (2) of this title [20 C.F.R. § 410.412(a) (2) (1986)]) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40-45	60
Above 45	Any value

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a) (1) of this title [20 C.F.R. § 410.412(a) (1) (1986)]); or

(2) In light of all relevant evidence, it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a) (1) of this title [20 C.F.R. § 410.412(a) (1) (1986)]); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 [20 C.F.R. Part 718] of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

2. The following additional statutes, regulations and other authorities are reprinted in the Petitioners' Appendix:

(a) Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (Pet. App. 166a).

(b) Section 12 of the Administrative Procedure Act, 5 U.S.C. § 559 (Pet. App. 167a).

(c) Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (Pet. App. 168a).

(d) Section 19(d) of the Longshore Act, 33 U.S.C. § 919(d) (Pet. App. 169a).

(e) Published Commentary on 20 C.F.R. § 727.203, 43 Fed. Reg. 36,826 (1978) (Pet. App. 158a).

(f) 20 C.F.R. § 410.490 (1986) (Pet. App. 163a).

STATEMENT OF THE CASE

A. Description of the Issues

The Black Lung Benefits Act, its implementing regulations as consistently construed by the Secretaries of Labor and of Health and Human Services, and the Administrative Procedure Act require that an "interim presumption" of eligibility for black lung benefits, prescribed by rule, must be established by a preponderance of credible, relevant evidence. The Fourth Circuit disagreed, holding that *any* evidence will do and that such evidence cannot be challenged. Petitioners seek a reversal of the Fourth Circuit's holding and a return to the long-standing and fair rule that invocation is accomplished only upon a finding that it is justified by a preponderance of the reliable, probative, and substantial evidence.

B. Background of the Black Lung Benefits Program and Impact of Decision Below

The Black Lung Benefits Act, as amended,[2] 30 U.S.C. §§ 901-945("the Act"), establishes a federally administered workers' compensation program that provides employer-funded benefits to coal miners and their families because of a miner's total disability

2. Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, and the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635, and Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a)(d), 100 Stat. 312, 313 (1986).

or death due to pneumoconiosis ("black lung" disease) arising out of coal mine employment.

During the course of this complex administrative program, nearly one million claims have been filed and hundreds of thousands of claimants have received billions of dollars in benefits.[3] The average cost of a single black lung claim over a twenty-year period has been estimated by the Department of Labor as $118,315.88 in the case of an unmarried miner and $185,659.69 in the case of a married miner. U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981). Thousands of cases are still pending.[4]

In administratively processing this staggering number of claims, the liability issue has, as a practical matter, turned on whether or not a particular claimant was able to invoke a presumption of eligibility for benefits (called the "interim presumption"). This presumption is an exceptionally powerful vehicle for entitlement. Until this case, both administering agencies and the courts had required claimants to carry the burden of proving the basis for invocation by a preponderance of the evidence. The court below held that *any* single piece of evidence, regardless of reliability or weight, is sufficient to invoke the presumption. The defendant, in turn, has no right to question or challenge claimant's invoking evidence.[5] This holding greatly impairs the ability

3. U.S. Dep't of Labor, *Black Lung Program Claims Status Report* (1987).

4. The huge backlog of pending claims prompted Congress to increase the size of the Benefits Review Board from three to five permanent and four temporary members in 1984. H.R. Rep. No. 1027, 98th Cong., 2d Sess. 33-34 (1984). The huge ALJ backlog prompted a special appropriation of funds to the Office of Administrative Law Judges in 1985.

5. In *Back* v. *Director, Office of Workers' Compensation Programs*, 796 F.2d 169, 172 (6th Cir. 1986), and *Engle* v. *Director, Office of Workers' Compensation Programs*, 792 F.2d 63, 64 n.1 (6th Cir. 1986), the Sixth Circuit has expressly rejected *Stapleton*, holding instead that invocation occurs only if an invocation fact is established by a preponderance of the evidence. Subsequently, in *Revak* v. *National Mines Corp.*, 808 F.2d 996 (3d Cir. 1986), the Third Circuit has adopted the view of the Fourth Circuit, overruling *sub silentio* its prior decision in *Gober* v. *Matthews*, 574 F.2d 772 (3d Cir. 1978). In *Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 801 F.2d 958, 962 (7th Cir. 1986), the Seventh Circuit held that a single untested item of evidence "permits—although it does not necessarily require" invocation.

of mine operators to defend questionable claims. It will disrupt the litigation of tens of thousands of claims and, if affirmed, will require the retrial of many.

C. Background of These Cases

Respondents Cornett, Ray and Stapleton ("claimants") are former coal miners who filed claims for benefits with the U.S. Department of Labor. Each alleged total disability due to coal mine employment-related pneumoconiosis. Mullins, Jewell and Westmoreland are the last coal mine operators to have employed Cornett, Ray and Stapleton, respectively. A miner's most recent coal mine employer is generally liable for the payment of benefits awarded, if any. 20 C.F.R § 725.493(a) (1986).

In each of these claims, the employer contested liability on the grounds that the miner neither had occupational lung disease nor suffered any disability related to coal dust exposure. In each case, the claimant, the employer and the Department of Labor separately obtained and submitted medical data and other relevant evidence into the claim record. Much of the medical evidence submitted in all three claims was in sharp conflict.

To determine claimants' eligibility in these cases, the adjudicator evaluated the record according to a variety of statutory and regulatory definitions, presumptions and rules of evidence. These provisions vary depending upon the date the claim was filed and the identity of the federal agency with which the claim is filed.[6] All claims filed with the Labor Department prior to April

6. Claims originally submitted prior to July 1, 1973 were filed with and adjudicated by the Social Security Administration (SSA). Claims submitted after June 30, 1973 were to be filed under an approved state workers' compensation law, 30 U.S.C. § 931, or absent such a law, with the Secretary of Labor. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 8-9 (1976). No state's law was ever approved. SSA eligibility criteria are set forth at 20 C.F.R. Pt. 410, Subpart D (1986). For Labor Department claims filed prior to April 1, 1980, eligibility criteria are codified at 20 C.F.R. Pt. 727 (1986). Criteria applicable to Labor Department claims filed after March 31, 1980 are set forth at 20 C.F.R. Pt. 718 (1986).

1, 1980, including these three, must be considered under the "interim presumption."

D. History of the Interim Presumption

The Social Security Administration ("SSA") commenced its segment of the black lung program in 1970 and promulgated benefit eligibility standards. 36 Fed. Reg. 23,752-70 (1971). In late 1971 and early 1972, some members of Congress expressed concern over SSA's claims approval rate, noting that it suggested a less than complete "solution."[7] S. Rep. No. 743, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2305, 2307.

This inquiry produced the Black Lung Benefits Act of 1972, 86 Stat. 150, which liberalized eligibility standards through the creation of a new presumption, 30 U.S.C. § 921(c)(4); revised the definitions of "pneumoconiosis" and "total disability," 30 U.S.C. § 902(b), (f); and prohibited the denial of a claim solely on the basis of a single negative chest x-ray. 30 U.S.C. § 923(b). *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 10-12 (1976). In evaluating proposed amendments, the Senate Committee on Labor and Public Welfare addressed administrative difficulties experienced by SSA as a result of the unexpectedly large volume of claim filings and the limited availability of certain medical testing facilities in coal mining regions. S. Rep. No. 743, *supra*, 1972 U.S. Code Cong. & Ad. News at 2322-23.

The Committee's Report stated:

> ... [T]he backlog of claims which have been filed ... cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly, the Committee expects the Secretary [HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments. ...

Id.

After enactment of the Black Lung Benefits Act of 1972, SSA published a regulation entitled *Interim Adjudicatory Rules for Certain Part B Claims Filed by a Miner Before July 1, 1973, or by a Survivor of a Miner Where the Miner Died Before January 1, 1974*. 20 C.F.R. § 410.490 (1986) (Pet. App. 163a). By virtue of its application to claims filed before the dates stated, the provision could not be applied in "Part C" (Department of Labor) claims, and Labor's regulations expressly so provided.[8] 20 C.F.R. § 718.2, 38 Fed. Reg. 16,965 (1973) (repealed 1978).

SSA's interim rules established a rebuttable presumption of a claimant's entitlement to benefits which could be invoked if (a) a chest x-ray, biopsy or autopsy "establish[ed] the existence of pneumoconiosis," 20 C.F.R. § 410.490(b)(1)(i); or (b) the miner had at least 15 years of dust exposure and specified values on pulmonary function tests "establish[ed] the presence of a chronic respiratory or pulmonary disease," 20 C.F.R. § 410.490(b)(1)(ii); and (c) if under either provision occupational causation was established or otherwise presumed. 20 C.F.R. § 410.490(b)(2)-(3). Rebuttal was permitted upon proof that the miner was not totally disabled due to the disease. 20 C.F.R. § 410.490(c).

Under the 1972 Act and the "interim" rules, SSA's claims approval rate increased significantly.[9] The Labor Department, in the early years of its program, approved a lower percentage of

7. The SSA or "Part B" Program was designed to remedy the past failure of state workers' compensation laws to provide adequate coverage for death or total disability due to pneumoconiosis. H.R. Rep. No. 460, 92d Cong., 1st Sess. 2 (1971), *reprinted in* House Comm. on Labor and Public Welfare, Subcomm. on Labor, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969, as Amended Through 1974*, 1725 (1975). Part B benefits were and continue to be federally financed.

8. Prior to March 1, 1978, only SSA had authority to develop medical eligibility criteria for both segments of the Program. Federal Coal Mine Health and Safety Act of 1969, § 402(f), 83 Stat. 793, as amended by the Black Lung Benefits Act of 1972, § 4(a), 86 Stat. 150 (1972).

9. *See* Dep't of HEW, SSA, *2d Ann. Rep. to the Congress on the Administration of the Black Lung Benefits Act of 1972* (1977).

claims than did SSA. The Labor Department Program was quite different in many respects. Benefits were to be paid by a mine operator. The operator was permitted to contest questionable claims.[10] Other statutory and regulatory differences distinguished the two programs and, of course, the interim presumption did not apply in Labor Department claims.

Labor's comparatively low approval ratio prompted inquiry. The inapplicability of the interim presumption was considered an important reason for this disparity. *Oversight of the Administration of the Black Lung Program, 1977: Heartngs Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 49 (1977) [hereinafter *1977 Senate Hearings*]; *Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 341, 349, 399 (1973-74).

Legislative efforts to make the presumption applicable to Labor Department claims then began.[11] The matter prompted spirited discussion in congressional proceedings. SSA believed that the presumption was legally inappropriate for use in claims involving the liability of individual mine owners.[12] Two SSA staff physicians testified that the presumption was scientifically

10. Section 422(a) of the Act, 30 U.S.C. § 932(a), incorporates by reference many of the claims adjudication procedures prescribed in the Longshore Act. 33 U.S.C. §§ 901-952. Under 33 U.S.C. § 919(a)-(c), claims are first informally considered by a Labor Department employee. If agreement is not reached, any party may request a hearing to be conducted by an administrative law judge (ALJ) qualified under 5 U.S.C. § 3105, and in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 554. An aggrieved party may appeal an ALJ's decision to the Benefits Review Board and, if unsuccessful, to the United States court of appeals for the circuit in which the injury occurred. The Board and the court review the ALJ's decision to determine whether it is supported by substantial evidence and in compliance with law. 33 U.S.C. § 921(b), (c).

11. *E.g.*, H.R. 7, 94th Cong., 1st Sess. § 8 (1975); H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 3333, 94th Cong., 1st Sess. § 3 (1975).

12. S. Rep. No. 770, 94th Cong., 1st Sess. 11-21 (1975), *reprinted in* House Comm. on Education and Labor, *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* 113, 123-31 (Comm. Print 1979) [hereinafter *1977 Legislative History*].

unsound, noting in effect that the facts presumed after invocation were not supported by the facts proven, and that the presumption, more than anything else, reflected a policy choice by SSA which would assist in eliminating the agency's backlog.[13] Labor Department officials also testified that the presumption was not appropriate for Part C claims. Labor requested new legislative authority to write its own medical eligibility rules.[14] Other witnesses called for a liberalization of the Part C eligibility criteria.[15] The Comptroller General of the United States reported to the Congress that SSA claimed an inability to rebut its interim presumption as a result of limited resources, thus producing unsubstantiated awards. He suggested that Congress consider application of the presumption in Labor Department claims, but that such application should direct the Labor Department to substantiate entitlement by medical evidence.[16]

When final bills were produced, the House version required application of the presumption in all claims.[17] The Senate bill permitted the Secretary of Labor to design and adopt his own eligibility criteria.[18] The compromise that emerged authorized Labor to write new standards of entitlement but also required

13. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA) [hereinafter *1977 House Hearings*]; *1977 Senate Hearings, supra* p. 10, at 193-95 (testimony of Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA).

14. *1977 Senate Hearings, supra* p. 10, at 154; *1977 House Hearings, supra* note 13, at 241 (testimony of Donald Elisburg, Assistant Secretary of Labor).

15. *See* S. Rep. No. 1254, 94th Cong., 2d Sess. 11 (1976), *reprinted in 1977 Legislative History, supra* note 12, at 336; *1977 Senate Hearings, supra* p. 10, at 196.

16. Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements are Needed*, 43-47, 52 (1977), *reprinted in 1977 Senate Hearings, supra* p. 10, at 316-320, 325.

17. H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977).

18. S. 1538, 95th Cong., 1st Sess. § 2 (1977); *1977 Legislative History, supra* note 12, at 515-17.

application of the interim presumption in approximately 220,000 pending and previously denied claims, and in all new claims filed prior to Labor's publication of new criteria.[19] The compromise was implemented by 30 U.S.C. § 902(f)(2), which provides:

> Criteria applied by the Secretary of Labor in the case of—[certain categories of claims filed prior to publication of Labor's new regulations] shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

The conferees cautioned the Labor Secretary that SSA's history of making unsubstantiated awards was not to be repeated—

> With respect to a claim filed or pending prior to the promulgation of such [new] regulations, such regulations [the presumption] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.[20]

On the date of enactment by the Senate, Senator Javits, a conferee and supporter of the bill, stated:

> The "interim" standards as they were applied to determine benefit claims under Part B, have been highly controversial and widely criticized . . . .
>
> I therefore requested that the statement of managers include language to the effect that "all relevant medical evidence" be considered in applying the "interim" standards . . . .

19. House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 22 (1981). New criteria were published by Labor at 20 C.F.R. Pt. 718 (1986) and apply to all claims filed after March 31, 1980.

20. H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Ad. News 309.

1977 Legislative History, *supra* note 12, at 909.

In the House, Congressman Perkins, a conferee and sponsor of the legislation stated, "We do recognize in the joint explanatory statement that the Secretary of Labor may apply the interim standards to its Part C claims within the context of all relevant medical evidence." *Id.* at 929.

E. The Presumption Invocation Provisions

The Act provides benefits for total disability or death due to pneumoconiosis. 30 U.S.C. § 901(a). Pneumoconiosis is "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). If invoked, and not rebutted, the interim presumption conclusively establishes all elements of a claim. 20 C.F.R. § 727.203(a).

The presumption is available under 20 C.F.R. § 727.203(a) if the miner engaged in coal mine employment for ten or more years.[21] After this threshold is established, five alternative methods are prescribed, any one of which is sufficient to complete invocation. Invocation may be accomplished on the basis of (1) chest x-ray, biopsy or autopsy evidence, § 727.203(a)(1); (2) certain data produced on "ventilatory studies," also called pulmonary function tests ("PFTs"), § 727.203(a)(2); (3) certain data produced in "blood gas studies," § 727.203(a)(3); (4) other medical evidence including a physician's opinion establishing a totally disabling respiratory or pulmonary impairment, § 727.203(a)(4); or (5) the affidavits of a survivor of a miner or affidavits of other persons, which, in the absence of medical evidence, establish totally disabling lung disease, § 727.203(a)(5).[22]

21. In the instant case, the plurality opinion of Judge Sprouse implies but does not hold that ten years of employment must be proven, not merely alleged (Pet. App. 82a-83a).

22. This final method of invocation was not addressed by the Fourth Circuit and would have no application in the instant cases. Presumably, to be consistent, the Fourth Circuit would not permit the weighing of conflicting affidavits in the invocation phase.

Each method warrants some explanation. Chest x-ray, biopsy, and autopsy are independent methods of diagnosing pneumoconiosis. Autopsy is most definitive. Biopsy is never warranted for purposes of diagnosing pneumoconiosis alone. If a biopsy or autopsy is performed, tissue slides are available for review by consulting pathologists and disagreements among pathologists may occur. Multiple interpretations of chest x-ray films are typically present in claim records. A properly executed[22] chest film may or may not demonstrate opacities indicative of an abnormality. Opacities may reflect tissue reaction due to coal dust, other dusts, infections, smoking, or other causes.[24]

Chest film interpretations are sometimes in sharp conflict. Changes in x-ray interpretation over time may be indicative of a reversible condition, progression of disease, misreading of the film or differences of opinion. Cross-examination is accomplished by rereading of films or taking new films.

PFTs are breathing tests that measure an individual's ability to move air in or out of the lungs in the course of specified maneuvers. Two separate measurements are relied upon for invocation of the presumption.[25] The FEV_1 (one-second forced expiratory volume) is a measurement of the volume of air which can be forcibly expelled on maximum effort in one second. The MVV (maximum voluntary ventilation) is a measurement of the volume of air which can be moved in and out of the lungs with maximum effort in one minute. Both tests are highly susceptible to error. *See* 20 C.F.R. Pt. 718, App. B (1986); SSA regulations, 20 C.F.R. § 410.430 (1986). Test results do not generally establish a diagnosis but may detect a deviation from normal

23. Occasionally, a dispute is presented concerning whether the film is of adequate technical quality to permit a diagnosis. The Department of Labor has published technical quality standards at 20 C.F.R. Part 718, Appendix A (1986).

24. Pendergrass, Lainhart, Bristol, Felson & Jacobson, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981).

25. A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* 19, 67-68 (1986).

pulmonary capabilities attributable to an array of acute or chronic illness.[26]

Study results may vary from time to time as a result of acute or temporary illness, treatment of reversible illness, technician error, history of cigarette use, or variations in the effort expended by the patient.[27]

The interim presumption threshold invocation values may confer benefit of the presumption on older miners whose capabilities are within normal range. *1977 House Hearings, supra* note 13, at 274-75 (testimony of Dr. Harold I. Passes). Cross-examination is accomplished by reviewing the test record or retesting.

Blood gas studies measure dissolved gases in arterial blood and its acid-base balance (ph).[28] A single sample of blood is tested for various components including dissolved oxygen (pO_2) and carbon dioxide (pCO_2). The resultant data, if abnormal, may show a defect in the ability of the pulmonary system to oxygenate the blood and remove waste gases, or metabolic, cardiovascular, or other diseases.[29] Tests are sensitive to the altitude of the location at which the test is performed (barometric pressure), proper handling of the sample, drug use and other factors.[30] Varying results, from time to time, may be due to resolution of illness, improper testing procedures, changes in personal habits, or location of the test facility.[31] Cross-examination of blood gas test results can (with few exceptions) be accomplished only by retesting.

Invocation by "other medical evidence," § 727.203(a)(4), focuses on physician opinion evidence in the form of written reports, depositions or live testimony. The invocation provision requires the physician to document findings and provide a rationale for diagnoses or conclusions. Differences of opinion are fairly

26. *Id.* at 4-5. PFTs produce much data in addition to the FEV and MVV measurements which are of value to the diagnostician.

27. *Id.* at 3-4, 34-35, 43-44. Pneumoconiosis, if present, is irreversible. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 7.

28. *Id.* at 162.

29. *Id.* at 162, 176, 376-78.

30. *Id.* at 162, 186-87, 376-78.

31. *Id.*

common and may be explained by invalid objective test results, the physician's competence, or any of the other variables that cause experts to differ.

F. Effect of Invocation

Invocation of the interim presumption establishes prima facie entitlement. The circuits agree that invocation of the presumption permanently and irrevocably shifts the ultimate burden of persuasion to the claim defendant. *Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d 1426, 1430 (10th Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984); *Consolidation Coal Co.* v. *Smith*, 699 F.2d 446, 449 (8th Cir. 1983). In the Fourth Circuit, the rule applied on rebuttal requires the employer to "rule out" presumed facts. *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123 (4th Cir. 1984).

G. Mechanics of Presumption Rebuttal

Four alternative methods of rebuttal are available. 20 C.F.R. § 727.203(b)(1)-(4) (1986). Each method prescribes an affirmative defense. But, as these provisions are applied by the courts, the presumption is extremely difficult to overcome.

The Fourth and Seventh Circuits have held that the presumption may not be rebutted even by conclusive proof that the miner suffers from no respiratory impairment at all, if he is disabled for work by non-occupational ailments. *Sykes* v. *Director, Office of Workers' Compensation Programs*, ___ F.2d ___, No. 85-1441, slip op. at 8-9 (4th Cir. Mar. 3, 1987); *Wetherill* v. *Director, Office of Workers' Compensation Programs*, ___ F.2d ___, No. 86-1053, slip op. at 5-6 (7th Cir. Feb. 25, 1987). Rebuttal is generally precluded unless it can be proven that coal dust exposure *in no part* contributes to the miner's overall non-occupationally related disability. *Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 801 F.2d 958, 963 (7th Cir. 1986); *Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 78 (3d Cir. 1984), or absent proof which "rules out" the possibility that dust exposure aggravated a non-occupational illness. *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d at 124 (cancer). The Third Circuit prohibits rebuttal unless "persuasive evidence" demonstrates the absence of not only medical pneumoconiosis but "legal" pneumoconiosis as well. *Pavesi* v. *Director, Office of Workers' Compensation Programs*, 758 F.2d 956, 965 (3d Cir. 1985).

While all circuits now agree that relevant rebuttal evidence must be considered, the Tenth permits rejection of an expert's opinion that a presumed fact is untrue, on the theory that such testimony, however medically correct it may be, is contrary to the purposes of the Act. *Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d at 1430. The Fourth holds that a consulting pulmonary specialist's opinion is "insufficient as a matter of law" to rebut, *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d at 125, while the Third has held that such a report may have probative value "in some circumstances." *Evosevich* v. *Consolidation Coal Co.*, 789 F.2d 1021, 1028 (3d Cir. 1986).

Within this setting, rebuttal may be accomplished, but "prescribed methods of rebuttal leave responsible coal mine operators with a heavy burden." *Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d at 1431. It is not unusual for the legal standard imposed in the evaluation of rebuttal evidence to exceed the capabilities of human biological sciences.

H. Presumption Invocation in the Instant Cases

In Stapleton's case, x-ray evidence was in conflict (Pet. App. 108a-109a). Two PFTs were discredited as invalid (Pet. App. 109a). Blood gases were above disability levels (Pet. App. 109a). Medical opinion evidence established disability due to heart disease, a back injury and other difficulties (Pet. App. 110a-113a). The ALJ invoked the presumption on the single positive

x-ray, but did not weigh it against negative interpretations (Pet. App. 113a). On a rebuttal inquiry, the ALJ weighed the negative x-rays and other relevant evidence, concluding that it established an absence of both pneumoconiosis or any disabling respiratory or pulmonary impairment. Rebuttal was, therefore, accomplished (Pet. App. 114a-116a).

On appeal, the Board affirmed on the grounds that the ALJ's rebuttal findings were supported by substantial evidence, noting harmless error in the ALJ's failure to weigh all x-ray evidence in the invocation phase (Pet. App. 104a-105a). Stapleton appealed to the Fourth Circuit.

Ray's case presented nine x-ray readings, all but one of which failed to diagnose pneumoconiosis (Pet. App. 128a-129a). Six PFTs were in the record, two of which met invocation values (Pet. App. 130a). The blood gases did not invoke (Pet. App. 131a). The medical opinion evidence was in conflict (Pet. App. 132a-133a). The ALJ weighed like-kind invocation evidence in each category and, finding that a preponderance of the evidence did not support invocation by any method, denied benefit of the presumption (Pet. App. 133a).

On appeal, the Board affirmed non-invocation as supported by substantial evidence (Pet. App. 118a). Ray appealed to the Fourth Circuit.

In Cornett's case, five x-rays were submitted, four of which were negative (Pet. App. 144a). Two PFTs were submitted, one of which would invoke (Pet. App. 145a). Three blood gases were submitted, two of which did not qualify (Pet. App. 146a). The ALJ invoked on all three bases. Rebuttal evidence was found inadequate and benefits were awarded (Pet. App. 150a).

On appeal, Mullins argued that while the ALJ considered all the invocation evidence, he did so inaccurately and did not weigh it but simply rejected negative tests and x-rays. The Board affirmed, finding the award supported by substantial evidence (Pet. App. 136a, 139a). Mullins appealed to the Fourth Circuit.

I. The Opinions Below

The Fourth Circuit, *sua sponte*, consolidated the three cases for *en banc* consideration and certified six questions to be addressed by the parties.[32] The court directed the parties to address these questions in light of panel decisions in *Hampton* v. *United States Department of Labor Benefits Review Board*, 678 F.2d 506 (4th Cir. 1982) (holding that the opinion of a physician, which is documented in part by PFTs and blood gas test results, is not competent rebuttal evidence); *Whicker* v. *United States Department of Labor Benefits Review Board*, 733 F.2d 346, 349 (4th Cir. 1984) (modifying *Hampton* to hold that such tests and opinions were probative evidence but may not "be used as the principal or exclusive" means of rebuttal); and *Consolidation Coal Co.* v. *Sanati*, 713 F.2d 480, 481-82 (4th Cir. 1983) (holding that, in the invocation phase, the claimant has the burden of proving an invocation fact by a preponderance of the evidence).

The Department of Labor intervened in this important matter. The agency argued that invocation may be accomplished only if the invocation fact alleged is proven by a preponderance of the evidence, and that all evidence relevant to any rebuttal inquiry must also be considered. The Department asked the court to accord substantial deference to its long-standing interpretation of its regulation.

A sharply divided court split into three groups producing four opinions. *Hampton*, *Whicker*, and *Sanati* were overruled (Pet. App. 4a). Varying groups in the majority held:

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32. The Fourth Circuit's Order queried as follows: Q1. Is the Part C interim presumption automatically triggered by any single piece of invoking evidence? Q2. If there is one positive x-ray and 10 negative x-rays, must the administrative law judge invoke the presumption as a matter of law? Q3. What minimum criteria such as authenticity, etc., must a positive x-ray meet to trigger the presumption? Q4. Once invoked, to what extent is non-qualifying medical evidence deemed proper rebuttal evidence? Q5. Is a negative x-ray permitted to "rebut" a positive x-ray? Q6. Are non-qualifying objective test scores permitted to rebut a positive x-ray?

1. A single positive x-ray or qualifying pulmonary function or blood gas study invokes the presumption. Comparable like-kind evidence is not weighed under § 727.203(a)(1)-(3) (Pet. App. 3a).

2. A single physician's opinion meeting the requirements of § 727.203(a)(4) invokes the presumption notwithstanding the presence of contradictory evidence (Pet. App. 3a).

3. The presumption may also be invoked under § 727.203(a)(4) on other medical evidence but, here only, invocation may be accomplished "under customary rules of evidence;" that is, "by a preponderance" (Pet. App. 3a).

4. "All relevant medical evidence" including negative x-rays and objective test results must be weighed in the rebuttal phase, limited only by the statutory prohibition against denial of a claim "on the basis of one negative chest x-ray" (Pet. App. 4a).

One majority opinion concluded that the plain language of § 727.203(a) dictated a single item invocation rule (Pet. App. 20a (Opinion of Hall, J.)); that the preponderance rule advocated by the Government and employers conflicted with the regulation and congressional intent, thereby depriving the Government's claim of deference of validity (Pet. App. 17a (opinion of Hall, J.)); and that the "statutory and regulatory scheme establishing the interim presumption supersedes the APA's" preponderance standard (Pet. App. 22a, note 8 (Opinion of Hall, J.)).

In a concurring opinion, the majority's refusal to accord deference to the agency's interpretation is justified by the belief that the Department's interpretation was a litigation position not consistently applied (Pet. App. 56a-59a (Opinion of Sprouse, J.)). A lengthy review of the legislative history documents the liberal intent of the Act, Congress's concern over proof difficulties confronted by claimants, and the participation by congressional staff in the regulatory process (Pet. App. 56a-83a (Opinion of Sprouse, J.)). This opinion concludes that the preponderance

standard advocated by the Government frustrates the intent of Congress (Pet. App. 81a-83a (Opinion of Sprouse, J.)).[33]

A second concurring opinion agrees with the conclusion that the language of § 727.203(a) and the legislative material surveyed supersedes any preponderance rule imposed by the Administrative Procedure Act ("APA"), in keeping with the APA's rule against supersedure, 5 U.S.C. § 559 (Pet. App. 93a-95a (Opinion of Widener, J.)). All three majority opinions on the invocation question expressed concern that the weighing of evidence in the invocation phase would preclude rebuttal in some circumstances, thus violating Congress's intent that the presumption not be rendered irrebuttable.

In the dissent, it is postulated that the Government's interpretation of the invocation provisions to require proof of invocation by a preponderance of the evidence is neither plainly erroneous nor inconsistent with the language of the Act or the rule and is entitled to substantial deference (Pet. App. 36a (Opinion of Powell, J.)).

SUMMARY OF ARGUMENT

Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b), requires that "[i]n determining the validity of claims under this part, all relevant evidence shall be considered . . . where relevant . . . ." The governing regulations, § 723.203, require a claimant to "establish" and "demonstrate" that the interim presumption should be invoked. The Secretaries of Labor and of Health and Human Services have for fifteen years consistently and properly interpreted this language to require claimants to present reliable, credible evidence and to establish by a preponderance of evidence that benefit of the presumption should be conferred. This administrative interpretation of the invocation provisions is reasonable, and entitled to substantial deference.

The Administrative Procedure Act, which is incorporated into the Black Lung Benefits Act, requires that a preponderance of

33. With respect to rebuttal, the opinions of Judges Sprouse and Hall would have retained the *Whicker* standard.

evidence standard be applied to invocation of the interim presumption. The Secretary of Labor may not exempt himself from the requirements of the APA either by regulation or practice, 5 U.S.C. § 559.

Section 7(c) of the APA, 5 U.S.C. § 556(d), which applies here, was intended by Congress to prohibit agency fact-finding on the basis of unreliable, insubstantial or directly discredited evidence. It ensures the right of cross-examination to all parties in on-the-record proceedings, so that administrative decisions are made on the basis of a "full and true disclosure of the facts."

The Fourth Circuit's majority opinion effectively precludes cross-examination with respect to invocation facts and relegates to virtual irrelevancy even conclusive proof of the inaccuracy and unreliability of invocation evidence. In the context of this powerful presumption, Section 7(c), its purpose as expressed by its framers, and as interpreted in *Steadman* v. *SEC*, 450 U.S. 91, 101-02 (1981), means that in invocation, as in rebuttal, all critical facts that a party is required to establish must be proven by a preponderance of the reliable, probative and substantial evidence.

For these reasons, the majority holding of the Fourth Circuit that benefit of the presumption is conferred without regard to the truth of the matter should be reversed.

ARGUMENT

I.

THE CONSISTENT AND LONG-STANDING INTERPRETATION OF THE STATUTE AND IMPLEMENTING REGULATIONS BY THE ADMINISTERING AGENCIES TO IMPOSE A PREPONDERANCE OF THE EVIDENCE STANDARD ON BLACK LUNG CLAIMANTS SEEKING TO INVOKE THE INTERIM PRESUMPTION DESERVES SUBSTANTIAL JUDICIAL DEFERENCE

A. The Language of the Black Lung Benefits Act in View of its Legislative History Authorizes the Secretaries to Require a Preponderance of Evidence to Invoke the Interim Presumption.

The language of the Act prescribes statutory presumptions, 30 U.S.C. § 921(c)(1)-(5), but does not expressly allocate burdens of proof or persuasion, or designate the quantum of proof required to prove a fact.

Those procedural matters are prescribed for Part B (SSA) claims by incorporation by reference of Section 205 of the Social Security Act, 42 U.S.C. § 405 (30 U.S.C. § 923(b)), and for Part C (Labor) claims by incorporation by reference of sections of the Longshore Act, 33 U.S.C. §§ 901-952 (30 U.S.C. § 932(a)). The Longshore Act, in turn, incorporates by reference the provisions of the Administrative Procedure Act governing on-the-record adjudications. 5 U.S.C. § 554, incorporated into 33 U.S.C. § 919(d), incorporated into Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a).

Congress, by this complicated scheme, intended to regulate matters of proof directly or by delegation. Some rules of proof are addressed in the Act. Section 413(b), 30 U.S.C. § 923(b), prohibits the denial of a claim on a single negative x-ray, limits the authority of the Secretary of HHS to cross-examine certain positive x-rays,[34] and provides that all miners are to be given the

34. The Secretary of Labor has applied this provision to Part C claims for which the Black Lung Disability Trust Fund, as distinct from a mine operator, is liable. Congress made it clear that it had no intent

opportunity for a complete pulmonary evaluation. Similarly, § 413(b) (emphasis added) provides in part:

> In determining the validity of claims under this part, *all relevant evidence shall be considered, including, where relevant,* medical tests such as blood gas studies, x-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

Enacted prior to the SSA presumption, the relevant evidence provision of § 413(b) was re-enacted in 1978 by Congress with full awareness of the presumptions, and has always been construed to apply with equal force in Part B and Part C claims. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 33. *See also* 30 U.S.C. § 940 (stating that § 413(b) is applicable to Part C "to the extent appropriate").

Each word of this statute must be accorded meaning. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). Congress expressly mandated that "all relevant evidence *shall* be considered, including, *where relevant*" the precise types of medical evidence which the Fourth Circuit held shall not be considered at a critical adjudicatory stage of the claims process. 30 U.S.C. § 923(b) (1986) (emphasis added). There is no question that the excluded medical evidence is relevant. Congress said consider the evidence. The courts have historically followed this mandate. The Fourth Circuit has "repealed" this mandate. The express language of the statute compels the *meaningful* consideration of relevant medical evidence. The Fourth Circuit's holding, for practical purposes, precludes its consideration.

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to limit a mine operator's right to challenge x-ray evidence. The legislative record in this regard is surveyed in *Tobias* v. *Republic Steel Corp.*, 2 Black Lung Rep. (MB) 1-1277 (Ben. Rev. Bd. 1981).

The Fourth Circuit purports to rely on the legislative history (Pet. App. 75a-83a). However, it is a fundamental rule of statutory construction that when the statutory language is clear, the legislative history does not control. *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981). Even if the express statutory language is ignored, nowhere does the legislative history state that when Congress enacted the language, "all relevant evidence shall be considered," it really meant to say "all relevant evidence shall be considered *only* during the rebuttal inquiry."[35] If Congress intended this important statutory limitation, which has escaped the notice of many courts for many years, it would have expressly so stated.

What the Fourth Circuit overlooks in its survey of the legislative record is that each specific reference to the interim presumption itself emphasizes that the Secretary of Labor, in determining claims under the presumption, must consider "all relevant medical evidence." H.R. Rep. No. 864, *supra* note 20, at 12, 1978 U.S. Code Cong. & Ad. News at 309; *see also supra* at pp. 12-13. This congressional commentary, like its statutory counterpart in § 413(b), neither makes nor suggests a distinction depending upon whether the Secretary is engaged in an invocation or rebuttal inquiry.

In holding that the "all relevant evidence" language applies to rebuttal only, the Fourth Circuit majority notes the remedial purposes of the Act[36] and discusses the fallibility of x-rays and

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35. In debate over provisions which prohibit the *Government* from challenging certain x-rays submitted by a claimant, Senator Chaffee, the sponsor of amendments to this provision, stated: ". . . Oddly enough, it deprives the Government of its defenses, but it does not deprive the owner of the mine of his defenses. In those instances where there is a known mineowner who employed the claimant, and the claimant comes in for his claim, in that case, there can be a rereading, a second reading, under this act, to protect the owner of the mine. To me, it is incongruous and I just do not understand it, that we are depriving the Government of a defense that we are not depriving the owner of the mine of." 123 Cong. Rec. 24,244 (1973) (statement of Sen. Chaffee).

36. In any event, reference to the remedial purposes of a workers' compensation law, which by its nature reflects a legislatively settled compromise between employer and employee interests, is no substitute for settled principles in construing its precise terms. *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs,*

other objective tests (Pet. App. 74a-82a (Opinion of Sprouse, J.)). The specific legislative history cited does not relate to the interim presumption, but to a variety of *proposed* automatic entitlements for long-term miners.[37] In support of these proposals, legislative proof was produced to demonstrate that benefits should be paid without any regard to medical facts. H.R. Rep. No. 151, 95th Cong., 1st Sess. 5-10 (1977), *reprinted in 1977 Legislative History*, *supra* note 12, at 512-17. These proposals were not enacted, and their legislative history is irrelevant. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 105 S. Ct. 3085, 3092 (1985). Neither do the general concerns expressed in congressional debate grant "license to ignore the plain meaning" of statutory terms. *United States* v. *Lorenzetti*, 104 S. Ct. 2284, 2291 (1984).

Relying upon a law review article written by counsel for Petitioners,[38] the Fourth Circuit majority appears to have given great weight to the suggested role of congressional staff in the regulatory drafting process (Pet. App. 61a, 62a, 73a, 81a (Opinion of Sprouse, J.)). This Court has never held that the post hoc involvement of congressional staff members in the drafting of agency rules is or ought to be an authoritative source of Congress's intent. There is no public record of the events discussed in the article. The events relied upon by the court are drawn solely from the article. Such reliance is not only inappropriate but also misconstrues the article.

The reference cited states: "Another provision would have required the adjudicator to weigh all the medical test evidence to determine whether the weight of this evidence established total

461 U.S. 624, 633 (1983); *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 282 & n.24 (1980).

37. H.R. 10760, 94th Cong., 2d Sess. § 3 (1976); H.R. 1532, 95th Cong., 2d Sess. § 3 (1977); H.R. 4544, 95th Cong., 1st Sess. § 2 (1977). Under these provisions, long-term miners would have been entitled to benefits on proof of a specified number of years of employment, without further proof of disease or disability.

38. Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869 (1981).

disability. This too was stricken by congressional command."[39] This statement was construed by the Fourth Circuit to mean that Congress, or at least the staff, disapproved weighing on invocation. The article refers to an earlier version of the presumption, provided to congressional staff, which precluded invocation unless all relevant proof of impairment (*i.e.*, PFTs, blood gases, and other proof of respiratory disability, weighed together) cumulatively established disability. It was this "all or nothing" approach to invocation which the staff disapproved in favor of the "either/or" method of invocation ultimately adopted.[40]

Neither the Act nor its legislative history lends even one word of express support to the "any evidence" invocation rule adopted by the court below. The express language and necessary implications therefrom require the weighing of all relevant evidence at this critical point in the claims proceeding. Common sense also dictates such a result.

B. The Express Language of the Interim Presumption Requires a Weighing of Evidence in the Invocation Phase.

The plain language of the presumption, requires the black lung adjudicator to weigh like-kind evidence in the invocation inquiry.

The title of the invocation paragraph, § 727.203(a), is "*Establishing interim presumption.*" Each invocation clause, respectively, permits invocation if a chest x-ray, biopsy, or autopsy "*establishes* the existence of pneumoconiosis," or PFTs "*establish* the presence of a chronic respiratory or pulmonary disease," or blood gases "*demonstrate* the presence of an impairment," or other evidence "*establishes* the presence of a totally disabling respiratory or pulmonary impairment." (Emphasis added.)[41] As

39. *Id.* at 897 n.138.

40. Later in the article, it is noted that "it has been established that a claimant . . . bears the burden of proving the facts necessary to invoke the presumption by a preponderance of the credible evidence." *Id.* at 903; *see also id.* at 906.

41. Similarly, the provisions of the rule which govern the rebuttal phase of the claims procedure also require defendant to "establish" the rebuttal prerequisites. § 727.203(b)(1)-(4).

the dictionary definition of "establish" equates the term with "prove," each circuit court which has defined "establish" within the context of the interim presumption has held that "establish" means "to prove by a preponderance of evidence." *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d at 1514. *Accord Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d at 1430; *Gibas* v. *Saginaw Mining Co.*, 748 F.2d at 1120; *see also Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 772 F.2d 304 (7th Cir. 1985). Indeed, both the Third and the Fourth Circuits, in interpreting the SSA x-ray invocation clause, 20 C.F.R. § 410.490(b)(1)(i), which is identical to that employed by Labor, 20 C.F.R. § 727.203(a)(1), concluded that the obligation to "establish" invocation means to prove by a preponderance. *Gober* v. *Matthews*, 574 F.2d 772, 775 (3d Cir. 1978); *Sharpless* v. *Califano*, 585 F.2d 664, 667 (4th Cir. 1978). In an opinion concurring in part and dissenting in part in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 51, Mr. Justice Stewart finds similar meaning in the terms "establish" and "demonstrate" as used in the statutory presumption at 30 U.S.C. § 921(c)(4).

If, as a matter of construction, a repetitious word usage is presumed to have the same meaning in all subsections of a statute, *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. at 633, it surely follows that the repeated use of the key word "establish" in this rule compels a consistent meaning throughout. The Fourth Circuit finds different meanings solely because the court says they differ (Pet. App. 22a note 8).

Judicial gloss aside, how does the plain language of the rule demonstrate congressional or agency intent that evidence which may be totally false *must* establish a critical presumption? It does not. Yet the majority below gives possibly false evidence absolute judicial protection.

The absurdity of that holding has led to predictably absurd results. In *Haynes* v. *Jewell Ridge Coal Corp.*, 790 F.2d 1113, 1114 (4th Cir. 1986), the Court of Appeals required invocation

as a matter of law on a single x-ray film despite the fact that six highly qualified experts interpreted the same film as negative for disease. In *Lagamba* v. *Consolidation Coal Co.*, 787 F.2d 172, 173 (4th Cir. 1986), the court found invocation as a matter of law on a positive x-ray in the face of a scientifically conclusive autopsy report ruling out pneumoconiosis. The x-ray reading was, by this proof, incontrovertibly wrong.[42] It defies logic to suggest that the substantial benefit of this presumption is properly conferred on the basis of directly discredited and unreliable proof. It is highly improbable that Congress intended to mandate this result. The Fourth Circuit's interpretation, producing so unreasonable a result, should not be favored. *See American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982).

Other language of the rule also refutes the result below. The introductory paragraph to the rebuttal section provides: "In adjudicating a claim under this *subpart*, all relevant medical evidence shall be considered." 20 C.F.R. § 727.203(b) (1986) (Pet. App. 64a). (Emphasis added.) The word "subpart" is defined at 1 C.F.R. § 21.9(b) (1986) as a device "to group related sections in a part." All of § 727.203, the interim presumption, is within *subpart* C of Part 727.[43] Therefore, the rule expressly requires that "all relevant evidence shall be considered," wherever it may be relevant in the entire *subpart*.

The Court of Appeals majority focused on the singular reference to "a x-ray," and the opinion of "a physician" to conclude that only one such item supports invocation (Pet. App. 20a, 66a-67a). With respect to the plural usage in the case of PFTs and blood gases, the majority reasons that two PFT maneuvers are

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42. Section 413(b), 30 U.S.C. § 923(b), provides in part: "Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis."

43. Subpart C contains eligibility criteria, including other presumptions, in addition to the interim presumption. 20 C.F.R. §§ 727.204-727.205 (1986).

required and exercise and resting blood gases might be conducted,[44] and in this light, the plural simply refers to the set of tests conducted (Pet. App. 20a-21a).

It has always been the case that "a" study, testing sequence or opinion may constitute substantial evidence in support of invocation. Corroborating evidence is not required. But by the same token, the provisions do not say "any" evidence invokes. The regulations provide that evidence which "establishes" the invocation fact is required. Thus, it is only by construing words in isolation, rather than reading the entire provision as a whole, which permits the Fourth Circuit's "plain language" conclusion that any positive invoking evidence, however false, is totally shielded from the truth in the invocation phase.[45]

The Fourth Circuit majority also focused on the relationship between the invocation and rebuttal provisions (Pet. App. 21a, 68a-73a). In particular, the majority asserts that weighing the evidence on invocation may render some of the rebuttal provisions unavailable, thus undermining Congress's intent that the presumption be made rebuttable (Pet. App. 21a, 68a).[46]

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44. This reasoning does not hold for blood gases, since either gases at rest or after exercise could invoke by any theory. Two separate studies are not required.

45. In the opinion of Judge Widener (Pet. App. 158a-163a), controlling significance is placed upon commentary published with the presumption in the Federal Register. While the commentary is not part of the rule and cannot serve to amend it, the import of this material is plainly misconstrued. In responding to comments objecting to the consideration of all relevant evidence (Pet. App. 160a), the Department posits a simple example to demonstrate, not that relevant evidence is ignored on invocation, but that all relevant rebuttal evidence is considered on rebuttal. There is nothing, in context, in this commentary, which provides that a single item of invocation evidence *always* establishes invocation, and, in fact, the statement is not addressed to any invocation issue. 43 Fed. Reg., 36,826 (1978).

46. Such logic stands reason on its head. Congress in attempting to create a complex but fair administrative process to compensate deserving black lung claimants as promptly as possible was well aware of (1) the hundreds of thousands of potential claimants, (2) the billions of dollars required to fund and operate the program, and (3) the administrative monolith it was creating. Surely against this background, Congress did not intend to preclude or mandate deferral of the search for the truth until later in the process, lengthening the proceedings and increasing the cost.

But this feature of the presumption's operation hardly seems so important. It is clear that Congress intended rebuttability, but neither the Act, nor its history, nor the rule mandate that consideration of all relevant evidence is limited to rebuttal. The plain meaning of the words used by Congress is much to the contrary, suggesting no general or specific limitation on the consideration of conflicting evidence, which is traditionally weighed to resolve the conflict wherever it appears. The number of methods of rebuttal available was of no special concern.[47]

The Fourth Circuit majority has concluded that Congress intended invocation of the interim presumption without the claimant having to "establish" anything. While some members of Congress would have preferred this result and unsuccessfully proposed legislation to achieve it, *see supra* note 11, the fact remains that these proposals were defeated and the Act and regulations refute that such result was intended by Congress.

Where invocation by a preponderance is required, as has historically been the case, invocation still benefits huge numbers of legitimate claimants by presuming facts in which there is often

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47. An important point overlooked by the Fourth Circuit is that, while the SSA version could only be invoked on x-ray and PFT evidence, Labor adds three additional methods of invocation and two additional methods of rebuttal. Congress neither directed this result nor addressed such enlargement in any way. What Labor did, with respect to (a)(3) (blood gas), (a)(4) (medical opinion) and (a)(5) (claimant affidavit) invocation and the two new rebuttal methods (§ 727.203(b)(3)-(4)) is to simply replicate the statutory presumption of 30 U.S.C. § 921(c)(4) within the interim presumption, while reducing the years of employment required for invocation from 15 to 10. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 35-37, this Court was troubled with the invocation/rebuttal dynamics of the statutory provision to the extent that it might be construed to limit rebuttal, and held that it did not. Justices Stewart and Rehnquist, dissenting in part, construed the provision to permit invocation only if fact A (total disability) was *proven*, and rebuttal if fact B (no occupational causation) or fact C (no disease) was *proven*. 428 U.S. at 51. This dissent has been the model for the application of the presumption since *Usery*. *See e.g.*, *United States Steel Corp.* v. *Gray*, 588 F.2d 1022, 1027 (5th Cir. 1978). Given the similarity between the statutory presumption and the new portions of the interim presumption, one would assume that the Secretary intended the regulatory presumption to operate like the statutory one.

little or no connection between the fact proven and those presumed. *See supra* pp. 10-11, 15. *Compare NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) (administrative presumption must rest on sound factual connection between proved and inferred facts); *see also Developments in the Law: Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1642 (1986). Rebuttal remains a difficult road, *see supra* pp. 16-17. Fair application of the presumption consistent with all its words clearly promotes the remedial purpose of the Act.

C. In This Highly Technical Field, the Agencies' Interpretations are Plainly Controlling.

This Court has consistently held that, in construing agency regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (quoting *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945)). If a rule is ambiguous, it is of little moment that differences of opinion concerning its meaning exist. If the administering agency's interpretation is a reasonable one, the agency's construction controls. *United States* v. *Larionoff*, 431 U.S. 862, 872 (1977); *see also Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 104 S. Ct. 2472, 2480 (1984).

Only when the administrator's view conflicts with the plain language of the Act, or clearly frustrates the statutory mandate, does it become proper for the courts to disregard an agency's interpretation of its own rule. *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981); *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978).

All other fundamental principles of interpretation support the agencies' interpretations over that of the Fourth Circuit majority. A long-standing, consistent interpretation adds weight to the agency's views, *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 719 (1975), especially if the agency participated in the drafting of the act in question. *See Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). The agreement of two agencies on the meaning espoused also adds weight. *Cf. General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 144-45 (1976). Where the matters regulated are technically complex, requiring an application of agency expertise, deference is all the more appropriate. *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council*, 105 S. Ct. 1102, 1108 (1985). Where Congress has considered and ratified long-standing agency views in a controversial area, the presumption in favor of the agency's views is most strong. *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979).

Under this traditional analysis, the case for according deference to the Department of Labor's interpretation is overwhelming.

The language of the Act supports the Secretary's view. The legislative record supports the Secretary's preference for a preponderance rule. *See supra* pp. 12-13, 24.

What is most compelling is the consistent and unwavering fifteen-year construction of the invocation provisions of the interim presumption by multiple Secretaries of HHS and Labor, all of whom have insisted upon a weighing of all relevant evidence in the invocation phase.[48] All have consistently required proof of each pertinent fact by a preponderance of the evidence as a prerequisite to invocation.

SSA's rule (Pet. App. 163a-166a) and Labor's rule employ identical language for x-ray and PFT invocation. Prior to enactment of the 1977 amendments (which required Labor to apply the presumption), SSA weighed the evidence before invocation,

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48. The Benefits Review Board has always required proof by a preponderance to establish invocation on x-ray, PFT and blood gas evidence. *Strako* v. *Zeigler Coal Co.*, 3 Black Lung Rep. (MB) 1-136 (Ben. Rev. Bd. 1981) (PFTs); *Lessar* v. *C. F. & I. Steel Corp.*, 3 Black Lung Rep. (MB) 1-63 (Ben. Rev. Bd. 1981) (blood gases); *Elkins* v. *Beth-Elkhorn Corp.*, 2 Black Lung Rep. (MB) 1-683 (Ben. Rev. Bd. 1979) (x-rays). For a time, the Board permitted invocation by a single medical opinion, requiring the weighing of contrary opinions on rebuttal, but the Board overruled itself on this point in favor of weighing. *Meadows* v. *Westmoreland Coal Co.*, 6 Black Lung Rep. (MB) 1-773 (Ben. Rev. Bd. 1984). The Board's views are not entitled to judicial deference. *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. at 278 n.18.

and invoked the presumption only upon a finding that the evidence supporting invocation preponderated.[49]

The pre-1977 amendment position of SSA is most significant because, had Congress disagreed with the SSA's consistent position, Congress had ample opportunity to make clear its disagreement in the 1977 amendments. It did not, and SSA's weighing of the evidence in the invocation phase has continued without interruption to this day.[50]

Labor, of course, always advocated and applied a preponderance rule, *see, e.g., Markus* v. *Old Ben Coal Co.*, 712 F.2d 322 (7th Cir. 1983), and the matter was considered so well settled that it rarely arose in claims litigation. In *Consolidation Coal Co.* v. *Sanati*, 713 F.2d 480 (4th Cir. 1983), the Board's refusal to apply a preponderance standard on medical opinion invocation was challenged and overruled by the Fourth Circuit at the urging of the Department.

Congress's response to the actions of the administering agencies is significant. *Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245, 3254-55 (1986). Congress has twice engaged in a comprehensive review of benefit eligibility criteria

49. A sampling of cases in which evidence was weighed and invocation denied include: *Hill* v. *Weinberger*, 430 F. Supp. 332, 355 (E.D. Tenn. 1976), *aff'd*, 592 F.2d 341, 344-346 (6th Cir. 1979); *Petrock* v. *Califano*, 444 F. Supp. 872, 875 (E.D. Pa. 1977); *Stefanowicz* v. *Mathews*, 443 F. Supp. 109, 111 (E.D. Pa. 1977); *Owens* v. *Mathews*, 435 F. Supp. 200 (N.D. Ind. 1977); *Welsh* v. *Weinberger*, 407 F. Supp. 1043, 1045-46 (D. Md. 1975); *Ward* v. *Mathews*, 403 F. Supp. 95, 98 (E.D. Tenn. 1975); *Zirkle* v. *Weinberger*, 401 F. Supp. 945 (N.D. W. Va. 1975); *Blackmon* v. *Weinberger*, 400 F. Supp. 1282, 1287 (E.D. Okla. 1975); *Baker* v. *Secretary of HEW*, 383 F. Supp. 1095, 1099 (W.D. Va. 1974).

50. *See, e.g., Couch* v. *Secretary of HHS*, 774 F.2d 163, 168 (6th Cir. 1985); *Lawson* v. *Secretary of HHS*, 688 F.2d 436 (6th Cir. 1982); *Souch* v. *Califano*, 599 F.2d 577, 581 (4th Cir. 1979); *Vintson* v. *Califano*, 592 F.2d 1353, 1358 (5th Cir. 1979); *Sharpless* v. *Califano*, 585 F.2d at 667 (holding under the SSA interim rule "we know of nothing in the Act, or in the 1972 amendments, or in their legislative history, to indicate that this fact [x-ray invocation] is not required to be proved by a preponderance of the evidence as is every other fact which is not presumed"); *Gober* v. *Matthews*, 574 F.2d at 775. Curiously, neither the Fourth nor the Third Circuits cited either *Sharpless* or *Gober* in adopting a different rule for Part C claims.

since adoptio of the SSA presumption. As noted, Congress surely was aware of SSA's invocation rule during the course of deliberations on the Black Lung Benefits Reform Act of 1977, 92 Stat. 95. Many of SSA's claim procedures and criteria were criticized, but the public record on the weighing of invocation evidence is remarkably silent. To the extent that matters of proof were discussed, it is fully apparent that Congress was concerned that all relevant evidence was not being properly considered, and it expressly directed the Secretary of Labor to ensure that all relevant evidence would be considered without limitation as to where or how. H.R. Rep. No. 864, *supra* note 20, at 12, 1978 U.S. Code Cong. & Ad. News at 309. The conferees directed the Secretary of Labor to determine how competing concerns raised in the interim presumption controversy were to be resolved, by developing standards to be "published in the Federal Register." *Id.*

That is what the Secretary did. When Congress returned to the eligibility portions of the Act in 1980-81, it reached the conclusion that the provisions then in use were too generous and scientifically invalid. Thus, many of the 1972 and 1977 amendments liberalizing eligibility rules were repealed. Black Lung Benefits Amendments of 1981, §§ 202, 203, 95 Stat. 1643-44. The interim presumption was repealed for new claims by regulation in 1980,[51] 20 C.F.R. Part 718 (1986), without comment by the Congress. This history confirms congressional approval and acceptance of the Labor Department's interpretation requiring a pre-invocation weighing and application of a preponderance standard. *See Red Lion Broadcasting, Inc.* v. *FCC*, 395 U.S. 367, 381 (1969) (discussing implied congressional ratification of administrative construction).

Nor is the agency's construction of its rule unreasonable. No sense of reason is offended by requiring claimants to produce reliable and probative evidence to invoke the presumption.

51. Thousands of interim presumption claims remain to be adjudicated. *See Petition for a Writ of Certiorari* filed herein at 16, 18 (August 29, 1986).

Since the interim presumption involves the consideration of technically complex scientific evidence, specialized agency expertise was employed in the rulemaking process to ensure that the mechanism by which benefit of the presumption was to be conferred had *some* supportable scientific basis and credibility. The presumption is not simply a rule of proof, but a rule of proof which distributes scientific or medical probabilities. As such, deference to the agency's interpretation is all the more warranted. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134 & n.25 (1977).

Two agencies, not one, have consistently required a weighing of pre-invocation evidence under provisions which are largely identical and clearly *in pari materia*. Neither agency's interpretation has changed in the course of fifteen years. Both interpretations were virtually contemporaneous with enactment of the enabling legislation, and both agencies participated very substantially in the legislative drafting process.

There simply is no good reason to strip the Secretary of Labor of his well-exercised discretion in promulgating and applying the rule at issue in this case. His judgment is entitled to substantial deference. The Fourth Circuit's search for a good reason to support a contrary conclusion is inaccurate, shortsighted, unpersuasive and wrong.[52]

52. In denying petitions for rehearing filed by the employer and the Department in *Revak* v. *National Mines Corp.*, No. 86-3211, op. sur denial of panel rehearing at 3 (3d Cir. Mar. 6, 1987), the Third Circuit concedes that: "Our discussion of agency deference . . . may have been off the mark." "In any event, the Supreme Court has granted certiorari in *Stapleton* and will determine the proper interpretation of the regulation." *Id.* at 5.

II.

THE ADMINISTRATIVE PROCEDURE ACT REQUIRES A CLAIMANT TO PROVE AN INVOCATION FACT BY A PREPONDERANCE OF THE EVIDENCE

A. The APA Applies in Labor Department Black Lung Claims.

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporates by reference Section 19 of the Longshore Act, 33 U.S.C. § 919. Paragraph (d) of § 19 provides: "Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of title 5 [of the United States Code]. . . ."

Section 554 of Title 5, 5 U.S.C. § 554, sets forth the rules of procedure and procedural rights which apply in on-the-record hearings subject to the Administrative Procedure Act, 5 U.S.C. §§ 551-559. The general applicability of the APA in black lung claim proceedings is not in dispute. *Director, Office of Workers' Compensation Programs* v. *Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977); *Director, Office of Workers' Compensation Programs* v. *Alabama By-Products Corp.*, 560 F.2d 710 (5th Cir. 1977); *Krolick Contracting Corp.* v. *Benefits Review Bd.*, 558 F.2d 685 (3d Cir. 1977); *Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977).

B. Application of the APA is Neither Superseded by Nor Subject to the Discretion of the Secretary.

Section 12 of the APA, 5 U.S.C. § 559 (Pet. App. 167a), provides in relevant part: "Subsequent statute may not be held to supersede or modify this subchapter . . . , except to the extent that it does so expressly." Under § 12, the APA is the functional equivalent of a procedural constitution for administrative law practice. This law was intended to set "minimum requirements" for hearings; agencies are to operate " 'across the board' in

accordance with its terms." H.R. Rep. No. 1280, 79th Cong., 2d Sess., *reprinted in* 1946 U.S. Code Cong. Serv. 1205. The APA's sponsor, Senator McCarren, termed the Act's provisions "minimum basic essentials, framed out of long consideration and in the light of . . . comprehensive studies." 92 Cong. Rec. 2148, 2151 (1946). Further, he said, "it will be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection. . . ." *Id.* at 2159.

This Court repeatedly has refused to permit supersedure of any APA rule by implication, *Rusk* v. *Cort*, 369 U.S. 367, 379 (1962); legislative history, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-52 (1950); agency regulation, *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51-53 (1955); or any other method short of direct, specific statutory language which expressly contradicts APA requirements. APA exemptions "are not lightly to be presumed," *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1958); "unless made by clear language or supersedure the expanded mode of review granted by that Act cannot be modified." *Brownell* v. *We Shung*, 352 U.S. 180, 185 (1956).

The courts of appeals have consistently applied these principles. As one court recently noted, "surely the import of the § 559 instruction is that Congress's *intent to make a substantive change* be clear." *Association of Data Processing Serv. Orgs.* v. *Board of Governors of Fed'l Reserve Sys.*, 745 F.2d 677, 686 (D.C. Cir. 1984) (emphasis in original). *See also Steere Tank Lines, Inc.* v. *ICC*, 714 F.2d 1300, 1310 (5th Cir. 1983) (holding an express reference to the standard of proof insufficient to meet § 559's supersedure requirements). Express supersedure should be narrowly construed. *Church of Scientology of California* v. *IRS*, 792 F.2d 146, 149 n.2 (D.C. Cir. 1986).

The Fourth Circuit majority in this case recognizes that a preponderance standard ordinarily applies to invocation facts (Pet. App. 22a, note 8, 93a), but holds that the language of the interim presumption itself, its legislative history, and the apparent actions of congressional staff members, are legally sufficient to supersede the APA standard of proof.

The Fourth Circuit majority is incorrect. Neither the Black Lung Act nor its history expressly prescribes that the burden or quantum of proof to be carried for invocation of the interim presumption is less than that required by the APA. Silence is far short of express supersedure. Congressional rhetoric not express in legislation also falls far short. The Fourth Circuit majority's supersedure by implication violates express provisions of the APA and is plainly inconsistent with the decisions of this Court.

The Government takes the position in this case that § 422(a) of the Black Lung Act, 30 U.S.C. § 932(a), contains an express exemption from the APA, even though it was not actually employed in this instance. *Brief for the Federal Respondent*, at 21 n.20.[53]

The section relied upon by the Government provides that incorporated Longshore Act sections shall apply "except as otherwise provided in this subsection or by regulations of the Secretary . . . ." 30 U.S.C. § 932(a). This special regulatory authority is granted to the Secretary to permit adjustment of the Longshore Act's claim timing sequences and payment procedures to the special needs of black lung claims. *Patton* v. *Director, Office of Workers' Compensation Programs*, 763 F.2d 553, 559 (3d Cir. 1985); *Director, Office of Workers' Compensation Programs* v. *Bivens*, 757 F.2d 781 (6th Cir. 1985); *U.S. Pipe & Foundry* v. *Webb*, 595 F.2d 264, 273 (5th Cir. 1979). It does not give the Secretary authority to disengage the APA by regulation.

The circuits repeatedly and persistently have refused to construe § 422(a) to authorize the Secretary to diminish basic procedural rights conferred on black lung claim parties by the Longshore Act or the APA. For example, when the Department

53. This position is at variance with that advanced by the Department below and in the Third Circuit. In *Revak* and *Stapleton*, government counsel argued that the APA required application of a preponderance of the evidence standard to support a finding of invocation fact. Brief of the Director, OWCP at 10 n.4, *Revak* v. *National Mines Corp.*, 808 F.2d 997 (3d Cir. 1986) (No. 86-3211).

of Labor cited § 422(a) as authority to appoint persons not qualified as administrative law judges to conduct black lung hearings,[54] the circuits uniformly rejected that purported reliance. *Director, Office of Workers' Compensation Programs* v. *Alabama By-Products Corp.*, 560 F.2d at 718; *Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d at 342 (holding that "the Secretary simply cannot be understood to possess authority to supercede [sic] the provisions of the APA as he sees fit"); *see also Director, Office of Workers' Compensation Programs* v. *Eastern Coal Co.*, 561 F.2d at 652. Other important rights conferred by the Longshore Act have been held immune from the Secretary's § 422(a) authority. *See, e.g., Warner Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 804 F.2d 346 (6th Cir. 1986) (notice of claim); *Trent Coal, Inc.* v. *Day*, 739 F.2d 116, 118 (3d Cir. 1984) (right to appeal).

There is, in sum, no indication that the Secretary's authority to conform Longshore Act procedures to the special needs of black lung claims administration also licenses the Secretary to deprive claim parties of APA protections. So broad a reading of § 422(a) violates this Court's rulings governing APA supersedure, and is inconsistent with the meaning and purpose of 5 U.S.C. § 559. The APA on-the-record hearing rules expressly apply in Black Lung Act claims in accordance with the terms of both enactments.

54. Congress recognized that § 422(a) did not authorize the Secretary to accomplish supersedure of the APA. Therefore it enacted express statutory authority to permit this usage in sequential appropriations acts and by joint resolution. *See, e.g., Director, Office of Workers' Compensation Programs* v. *Alabama By-Products Corp.*, 560 F.2d at 718; H.R.J. Res. 1118, 94th Cong., 2d Sess. (1976), *reprinted in 1977 Legislative History, supra* note 12, at 404.

C. Section 7(c) of the APA Requires Application of a Preponderance of the Evidence Standard to Interim Presumption Invocation Facts.

Section 7(c) of the APA, 5 U.S.C. § 556(d), applies to proceedings conducted in accordance with 5 U.S.C. §§ 554, 554(c)(2). Section 7(c) provides in pertinent part:

> Except as is otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence . . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts . . . .

The APA defines "rule," "order" or "sanction" to include "the whole or a part of" an agency action. 5 U.S.C. § 551(4), (6), (10). A black lung benefits award is a "sanction" within the meaning of 5 U.S.C. § 551(10)(E). Congressional intent to impose a sanction by presumption, without consideration of available relevant evidence should not be lightly inferred.

Presumptions are powerful vehicles of congressional and agency policy. "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive. . . ." *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976).

The interim presumption is an exceptional representative of its class. Invocation *is* entitlement to black lung benefits in huge numbers of cases. Invocation makes a prima facie case which, if unrebutted, establishes liability. Even if invocation by a preponderance is required, in practice, a prima facie case is very easy to make and quite difficult to rebut. Invocation *permanently* shifts the burden of persuasion. *See supra* p. 16. Rebuttal in most instances requires proof of a negative in the form of an affirmative defense. Invocation and rebuttal facts differ significantly, and proof which is relevant and significant in invocation is rarely adequate to prove a fact in rebuttal. The Fourth Circuit's new

rule permits an outcome determinative presumption to be invoked, even if based on patently invalid or false evidence. Congress incorporated the protections of the APA into the administrative process to prevent such a result. It is well settled that Congress has the power to prescribe rules of evidence and standards of proof. *Vance* v. *Terrazas*, 444 U.S. 252, 265-66 (1980). When Congress has not done so expressly in a matter subject to APA adjudication, the APA rules of proof apply. *Steadman* v. *SEC*, 450 U.S. 91, 101 (1981). In *Steadman*, this Court held that the imposition of a sanction in an APA proceeding must rest upon a preponderance of the reliable, probative evidence, 450 U.S. at 101-04. Section 7(c) emphasizes the intent of the APA that imposition of sanctions be based upon evidence of adequate quality and quantity to support a conclusion. *Id.* *Steadman* strongly suggests that *all* critical determinations in an APA-governed decision must be resolved on a preponderance of reliable evidence. In black lung litigation, there is no determination more critical than invocation of the interim presumption.

The legislative history of the APA is highly critical of agency action based on a mere scintilla of evidence or unreliable evidence. *See Steadman* v. *SEC*, 450 U.S. at 101-02. One congressional report notes: "No agency is authorized to stand mute and automatically disbelieve credible evidence." S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, 79th Cong., 2d Sess. 185, 208. "The basic provision respecting evidence in Section 7(c)—requiring that any agency action must be supported by plainly 'relevant, reliable, and probative evidence'—will require full compliance by agencies and diligent enforcement by reviewing courts. Should that language prove insufficient to fix and maintain the standards of proof, supplemental legislation will become necessary."[55] *Id.* at 216.

55. The Fourth Circuit's holding largely ousts judicial review of invocation fact-finding. The circuits, under 33 U.S.C. § 921(c) as incorporated by reference into 30 U.S.C. § 932(a), are obligated to review claims decisions to determine whether they are supported by substantial evidence. If, with respect to invocation, the decision need not be supported by substantial evidence either in a trial sense or appellate sense, effective review of the invocation process is precluded, and the right of review granted by 33 U.S.C. § 921(c) is diminished.

56. The Interstate Commerce Commission in *Port Norris Express Co.* v. *ICC*, 697 F.2d 497, 502-03 (3d Cir. 1982), argued that an applicant for a certificate to operate need only present "some evidence"

Senator McCarren stated that the drafters "laid down the rule that the administrative agencies must not make a finding which impinges on an individual unless there is behind such finding probative evidence to sustain it . . . . We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and so that they could say, 'We are not afraid to have our findings reviewed by a court.'" *Id.* at 321 (proceedings in the Senate, March 12, 1946 (statement of Senator McCarren)). Further, "[t]he agency must examine and consider the whole of the evidence relevant to any issue and, secondly, . . . it must be decided in accordance with the evidence." *Id.* at 365 (proceedings in the House of Representatives, May 24, 1946 (statement of Rep. Walter)). It seems clear that the Congress was determined to end the practice of agency fact-finding on unreliable or insubstantial evidence. The court below has not only revived but endorsed that practice.

Typically, a presumption which shifts the ultimate burden of persuasion imposes an intermediate burden on the party seeking its benefit to prove invocation by a preponderance of the evidence. *See, e.g., NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 403 (1983). Even if the presumption does not shift the ultimate burden of persuasion, the plaintiff's burden on invocation is met by establishing a prima facie case by a preponderance, which may then be defeated by defendant's production of credible rebuttal evidence. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 254-55 (1981). A prima facie case "must be supported by evidence." *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935). Where a presumption shifts the ultimate burden to the defendant to establish an affirmative defense, the establishment of a prima facie case necessarily requires a pre-invocation weighing of the evidence and a resolution of conflicts." *See Texas*

Dep't of Community Affairs v. *Burdine*, 450 U.S. at 253-54 & n.7. *Cf. U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs*, 455 U.S. 608, 613 (1982) (requiring claimant to allege and prove all essential elements of rebuttable presumption of coverage of injury under Longshoremen's and Harbor Workers' Compensation Act). To give benefit of such a presumption on false evidence, then shift the inquiry to affirmative defenses, simply is not consistent with the language or purpose of the APA or any sense of fair play in the conduct of litigation. Such an approach is clearly inconsistent with a statute which demands a "full and true disclosure of the facts."

The Secretary of Labor's conclusion that an intermediate preponderance burden must be carried for invocation of the interim presumption may have been reached independently, but it is also compelled by 5 U.S.C. § 556(d).

Section 7(c) of the APA was enacted to prevent agency reliance on unreliable evidence in the course of critical fact-finding no matter where in the litigation those facts were found, so long as the facts are relevant to the disposition of the matter. Since invocation of the interim presumption is so frequently dispositive, facts supporting invocation are likely to be the most relevant. If those facts need not be supported by substantial evidence as the term is defined in *Steadman*, then the rights to a fair hearing the APA is designed to secure for all parties are substantially diminished for black lung claim defendants. This would be less prejudicial if the rebuttal inquiry permitted a second specific look at the weight of invocation evidence, but it most often does not. On rebuttal, the inquiry shifts to the presence or absence of a broader set of defined facts. In this inquiry, proof of the complete invalidity of invoking evidence may not be adequate to rebut, since mere

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of public need to establish a prima facie case. The court rejected this argument, holding instead that the APA required "substantial evidence" in order to support such a finding. The court relied upon the appellate standard of review and not 5 U.S.C. § 556(d) for this holding.

unreliability, inaccuracy or falsity of claimant's invoking evidence does not necessarily establish rebuttal facts by a preponderance.

In *IT&T Corp.* v. *Local 134, IBEW*, 419 U.S. 428, 438-39 (1975), this Court observed that the generalities of the APA are best applied in consideration of the setting presented. Congress surely intended that the provisions of 5 U.S.C. § 556(d) would prohibit the consequences mandated by the court below and it made this important protection applicable in a black lung interim presumption adjudication. Section 7(c), in light of 5 U.S.C. § 551(10), should be construed to require a black lung claimant to carry the burden of proving invocation of the presumption by a preponderance of the evidence.[57] We urge the Court to so hold.

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57. In any event, the Secretary of Labor's interpretation of the invocation provisions to impose a preponderance burden, is certainly consistent with the APA rules of proof, and that interpretation gains still further claim to deference by virtue of this fact. *See NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. at 403.

CONCLUSION

The judgment of the Fourth Circuit, insofar as it holds that black lung claimants need not prove invocation of the black lung interim presumption by a preponderance of the evidence, should be reversed. The claims of Ray and Cornett should be remanded for consideration in keeping with this Court's opinion. Stapleton's claim is moot.

Respectfully submitted,

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